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CONVERGENCE BETWEEN MEDIA AND TELECOMMUNICATIONS: TOWARDS A NEW REGULATORY FRAMEWORK

Until recently, there was a sharp barrier between telecommunications as point-to-point voice and data applications, and broadcasting as point-to-multipoint video/audio applications. Progressively, over the past decade, this distinction has been blurred and convergence between the media and telecommunications industries has become inevitable, both in terms of technology and markets. The problem is that the two industries involved, the telecommunications industry and the mass media industry, have highly different regulatory structures. In other words, 'regulatory convergence' is extremely complex. This article examines the implications of this and what might be done.

A. INTRODUCTION

In 1991 Garnham and Mulgan pointed out several signs of convergence which include: 1) "the growing use of broadcasting networks, and of the spectrum allocated for broadcasting, to carry telecommunications-type data services", 2) "the development of joint-use broadcasting and telecommunications satellites", and 3) "the introduction into the basic switched telecommunications network of increasingly broadband transmission and switching capacity. This ultimately offers a potential development path via ISDN and broadband ISDN to integrated asynchronous transfer mode (ATM) broadband networks capable of delivering the full range of telecommunications and broadcasting services to the home."¹

THE PRESENT 'DICHOTOMIC' APPROACH

Present regulations have been conceived in a rather 'dichotomic' manner: each regulation either concerns telecommunications, or the audiovisual industries. This dichotomic approach (or sectorial approach) may be observed in the following ways:

1. TRADITIONAL DISTINCTION BETWEEN 'PRIVATE' AND 'PUBLIC' COMMUNICATIONS

The regulation of 'public' communications may be summarized as follows: with regard to actors, merger rules aim to ensure pluralism, as a guarantee of freedom of expression. Regarding broadcasting technologies (TV, cable, satellites), the aim is to control access in order to defend local cultural identities and promote local production (quota rules).

The regulation of 'private' communications concerns technology, and not content, (because of confidentiality considerations). It may be summarized as follows: the first aim is to guarantee access to a universal service with regard to certain telecommunication services (in particular, voice transmission), and in some instances, network access. As a result the monopoly of actors over communication technologies is

maintained, in any event, to define rules governing operators with the aim of ensuring a stabilization of economic and social objectives, such as universal service, high investment and penetration rates at low costs.

2. COMPARTMENTALIZATION OF TECHNICAL REGULATIONS AND LICENCES

Regulation has thus led to the compartmentalization of two worlds; that of the media on the one hand, and that of private communications on the other. Accordingly, we have noted strict limitations imposed through licences on interactive cable operators (see the 'Television without frontiers' Directive) and, in the opposite direction, the ban imposed on telecommunications operators to provide (themselves, and not necessarily via their affiliates) video distribution.

On top of these prohibitions, the control authorities, and even the standardization authorities (in Europe, the ETSI for some and the CEN-CENELEC for the cable distributors) vary according to whether they concern the media or telecommunications. Furthermore, regulation grants certain designated operators the authorization to carry out a predetermined task with a given technology method (in the UK there are licences for fixed networks, cellular radiotelephone service, PCN licences, POINTEL licences, RSA licences...). There are no less than four different types of satellite.

3. SEPARATION BETWEEN ACTORS AND THEIR ACTIVITIES

It must be mentioned at the outset that there is an important difference between the broadcasting and telecommunications sectors. The latter has been liberalized in the vast majority of Member States and is composed of state and privately owned companies. On the other hand, the telecommunications sector is still, in most cases, a monopolistic market, at least in so far as the basic services are concerned and the operators are often publicly owned.

In Europe, there are many regulatory obstacles preventing a company of the media sector from having a stake in another company belonging to the same sector (whether it is a stake in a monomedia company or multimedia company), and preventing a broadcasting and telecommunications company from providing transectorial services. Furthermore, the present regulations vary tremendously between Member States. The following list is by no means exhaustive and seeks to illustrate the various types of limitations which exist regarding ownership and the transectorial provision of services.

I. TRANSECTORIAL OWNERSHIP

- Restrictions on a shareholder having a stake in the capital of a radio or television broadcasting corporation (for instance: Germany, Spain, Portugal);
- Restrictions to monomedia concentrations in the press sector (for instance: Germany, France);

- Restrictions imposed on cable operators from having stakes in private television companies (for instance: the Flemish Community in Belgium);
- Limitations concerning multimedia concentration in the press sector and radio and television broadcasting corporations, through cross-ownership limitations (for instance: France, Italy, UK, the Netherlands);
- Prohibition imposed on public companies from having a stake in a private television company (for instance: the French Community in Belgium);
- Authorization imposed on a telecommunications company to own a cable operator (for instance: the Netherlands).

It can therefore be said that the regulations which restrict transectorial ownership primarily concern the press and television and radio broadcasting corporations. These rules generally prohibit telecommunications operators from having stakes in the press business and radio and television broadcasting corporations (even though their cumulative effects sometimes lead to this). However, the latter companies cannot easily do the same when the telecommunications operators remain state owned.

II. TRANSECTORIAL PROVISION OF AUDIOVISUAL AND TELECOMMUNICATIONS SERVICES

- Prohibition imposed on telecom operators from obtaining a radio broadcasting licence (for instance in Denmark, and the UK);
- Restrictions on providing public telecom services on a cable television network line (for instance in Denmark);
- Restrictions on obtaining a radio licence imposed on everyday users (for instance: Germany);
- Restrictions on the number of radio or television broadcasting licences for the same operator (e.g.: Germany, Greece, Spain, Flemish Community in Belgium);
- Prohibition for cable television companies to obtain point to point connections on their networks (for instance: The Netherlands);
- Prohibition for public enterprises to obtain a private television broadcast licence (for example: Germany, Italy);
- Lack of regulatory obstacles on the provision of telecom services by cable operators (for instance: UK);
- Lack of regulatory obstacles on the provision of radio broadcasting services by telecom operators (for instance: the Netherlands).

With reference to the transectorial provision of services, it can be noted that there are already many regulatory restrictions concerning companies belonging to the press or radio broadcasting sector and telecom operators. It can, however, be noted that the aim of these restrictions is chiefly to limit the provision of telecom services by radio broadcasting companies which can partially be explained by the fact that often, these telecom operators are in a monopoly situation for the provision of basic services.

From this short summary, it can be observed that there are certain types of transectorial activities or controls which are not regulated or forbidden, and where no regulatory obstacle to convergence may be found, while others are strictly regulated. It appears that the most regulated and controlled

sectors are the control and ownership of the media (in order to safeguard plurality of media); and possibilities for telecommunication operators to venture into the cable industry (in order to control dominant positions). At the same time, it can be observed that the regulations have, as already indicated, been based on technical criteria to distinguish between the different actors and activities.

B. THE AMERICAN AND JAPANESE APPROACHES

1. THE REGULATORY FRAMEWORK IN THE USA

Already a long debated issue in the USA, technology and market convergence are now well under way (as for market convergence in the USA, see for example the takeover of Telecommunications Inc., the largest US cable television company, by Bell Atlantic, one of the Baby Bells). This evolution has naturally put pressure on existing regulatory structures, and presently, several bills are pending before the US Congress to adapt the current regulatory structure to a new 'converged' framework. Noteworthy pieces of legislation related to convergence in the United States include the Markey-Fields Bill and the Brooks-Dingell Bill in the House of Representatives: the latter Bill (HR 3626) proposes a framework for allowing long-distance and local telephone companies to compete against each other. The Markey-Fields Bill (HR 3636), entitled the National Communications Competition and Information Infrastructure Act, aims to promote local telephone and cable television competition, as well as preserve and enhance universal service: these goals are advocated in the Markey-Fields Bill via the following measures:

- Repeal of the cable-telephone cross ownership rules;
- Prohibition of telephone companies buying cable systems within their service areas;
- The creation of a Federal-State Joint Board to ensure universal service by requiring all providers to contribute to universal service;
- A requirement that the Federal Communications Commission (FCC) review how the concept of universal service should be expanded to include provisions of 'digital service';
- The preemption of state laws that prohibit entry onto local telephone networks so that local telephone competition would be national policy;
- A requirement that local telephone companies establish separate subsidiaries for video programming services;
- A requirement that local telephone companies provide equal access to and interconnection with their network.

In the US Senate, mention can be made of legislation introduced by Senators Danforth, Inouye and Hollings. The American Administration has voiced its support of these Bills on several occasions.² Basically, two approaches may be distinguished to overcome the convergence issue.

- Simply allowing no change (maintain the status quo, currently backed up by the 1984 Cable Act, related FCC rules, and the information services restriction);
- Allow 'full entry' by telephone companies into the cable business, i.e. give more room for competition.

In the United States, it appears that the second approach has

been adopted, subject to the imposition of several safeguards. The reason underlying this approach is specific American reliance on market forces, and the conviction that, "In general, government restrictions that have the effect of limiting the uses to which new technology can be put tend to be inefficient and anticompetitive, and retard investment in that new technology".³ Put otherwise, the convergence of the telecommunications and cable TV industries would be enhanced by industrial logic rather than regulation. The reasons for convergence will be discussed below.

The Modification of Final Judgement (MFJ) prohibited the Regional Bell Operating Companies (RBOCs) from providing 'information services', interpreted to include everything from electronic publishing (e.g. news, business and sports) to cable television.

This information services restriction was lifted in 1991.⁴ Understandably, the RBOCs were pleased by this decision. Others, however, were seemingly discontented: the Newspaper Publishers Association, for example, voiced its fears concerning competition from online news and classified advertising. Furthermore, some consumer advocates expressed their worries as to the amount of information RBOCs might be able to control. Both of these concerns should be taken into consideration when analysing the implications of convergence within the European Union.

Since 1970, US telephone companies have been prohibited from providing cable television services, either directly or via affiliates owned, operated or controlled by them. As of 1988, the Federal Communications Commission (FCC) expressed its views in favour of eliminating the telco-cable cross-ownership prohibition. This was to be followed in 1991 by a report, issued by the National Telecommunications and Information Agency (NTIA), entitled *Telecommunications in the Age of Information*. Specifically, this report supported the idea that local exchange carriers (LECs) should be allowed to own, control and provide video programming over their own facilities. Indeed, LECs have long argued that the telco-cable cross-ownership restriction violates the First Amendment of the US Constitution, which provides that government shall make no law which abridges freedom of speech or of the press.⁵ In other words, telephone companies would have First Amendment rights, and accordingly, freedom of expression would apply to everyone. It should be repeated here that the repeal of the telco-cable cross-ownership rule is one of the measures advocated by the Markey-Fields Bill (see above). Up until now, the dichotomy in US regulation of communications has been between means of distribution and actual content. To quote Ithiel de Solà Pool,

"The traditional law of a free press rests on the assumption that paper, ink, and presses are in sufficient abundance that, if government keeps hand off, people will be able to express themselves freely. The law of common carriage rests on the assumption that, in the absence of regulation, the carrier will have enough monopoly power to deny citizens the right to communicate. The rules against discrimination are designed to ensure access to the means of communications in situations where these means, unlike the printing press, consist of a single monopolistic network. Though First Amendment precedents are largely disregarded in common carrier law, still this one element of central liberty is central to that law."⁶

The dichotomy is now crumbling. The reason underlying the NTIA's aforementioned position is that cross-ownership would serve to promote investment in broadband public network technology. This, in turn, would deliver "many types of telecommunications services that would be valuable in enhancing the economic and social lives of all US citizens."⁷ According to Henry Geller, "fibre-optic technology, under sound governmental policies, can contribute dramatically to promoting the underlying goal of the First Amendment, improving productivity, and enhancing the quality of life in the information age".

In economic terms, cost benefits would result from the combination of mass media and telephone services over a single infrastructure. For the time being, "The average telephone line in the US is used for only 20 minutes a day. For the remaining 23 hours and 40 minutes, it is dead". The effects of infrastructure investments on economic development are discussed in detail in the aforementioned NTIA report. The report also reviews social benefits.

It appears that the USA will indeed lift its current ban on telephone/cable TV cross-ownership in the upcoming year. The Markey-Fields Bill aims at this goal. At the same time, all telephone service providers would be required to open their networks to rivals with the guarantee of universal local telephone access. As a safeguard against anticompetitive practices, telecommunications operators would be prevented from linking up with cable companies operating in the areas where they run telephone services.

As it is, one must stress the argument that entry of large telephone companies into the cable television business could have an effect on competition. It is not, however, always clear that the effect would be negative: indeed it could lead to more diversity by increasing the choices available.

Editor's note: On 31 January 1995 the Telecommunications Competition and Deregulation Act of 1995 was presented to the 104th Congress for approval. Its aims is to provide for "a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."

Overall, a 'National Information Infrastructure' (NII), is supported by the Clinton administration and a broad range of US industries. Vice-President Gore, a long-time proponent of information superhighways, presented his plans for a new regulatory framework at a speech in Los Angeles on 11 January 1994, following an address at the National Press Club, in Washington, DC on 21 November 1993. Details of the National Telecommunications Reform in the United States may be found in a White Paper (obtainable via Internet). The outline of the reform, as presented by Vice-President Gore on 11 January 1994 aims at the following:

- encourage private investment;
- provide and protect competition;
- provide open access to the network;
- avoid creating 'information haves and have nots' (universal service);
- ensure flexibility.

I. ENCOURAGE PRIVATE INVESTMENT AND PROVIDE AND PROTECT COMPETITION

The two goals are linked: for Gore, "competition is the single most critical means of encouraging... private investment". The American administration is currently set on removing barriers to participation by private firms in all communications markets. Accordingly, it acknowledges the positive role done by the courts in connection with the MFJ. It underlines, however, the need to go beyond the consent decree of 1982. In so doing, the Administration specifically advocates the removal of the current cross-ownership restriction, i.e. telephone companies should be allowed to provide video services in their local exchange areas. As a safeguard against potentially anticompetitive mergers between telephone companies and cable companies, it is proposed that telephone companies be prohibited from acquiring cable systems located in the companies' local exchange areas (with an exception for rural areas). In any event antitrust laws would apply to telco-cable acquisitions.

Furthermore, the Vice-President acknowledges the need to interconnect the networks of competing providers with the facilities of all telephone companies on reasonable and non-discriminatory terms. The need to preempt state entry barriers is also stressed, and finally, the Administration supports the Brooks-Dingell Bill in that it: a) would require prior FCC and Department of Justice approval before the RBOCs may provide interexchange services (notably long distance services), and b) that it would require a separate affiliate for electronic publishing.

II. PROVIDE OPEN ACCESS TO THE NETWORK

The free flow of information requires open access. Accordingly, the Administration aims at lifting technical obstacles (affirmative action is to be taken 'to interconnect and to afford non-discriminatory access to network facilities, services, functions, and information'). It is envisaged to grant the FCC the future authority to impose non-discriminatory access requirements on cable companies.

III. AVOID CREATING 'INFORMATION HAVES AND HAVE NOTS' (UNIVERSAL SERVICES)

A basic feature of the 'Information Superhighway' is to avoid a society split between information 'haves' and information 'have nots'. Vice-President Gore's speech is somewhat short on the concept of universal service, if but to underline "that is critically important... that all carriers must be obliged to contribute, on an equitable and competitively neutral basis, to the preservation and advancement of universal service". He goes on further: "Our basic goal is simple: there will be universal service; that definition will evolve as technology and the infrastructure advance; and the FCC will get the job done" (our italics).

A Federal/State joint board is to be set up to make recommendations concerning FCC and state action on the fundamental elements of universal service (with the input of non-governmental organizations). Furthermore, "the FCC, in consultation with the states, would be authorized to permit 'sliding-scale' contributions (e.g. to avoid burdening small providers and new entrants), or 'in-kind' contributions in lieu of cash payments (e.g. to reduce the monetary payments owned by providers that offer to connect with schools, hospitals, etc.)."

IV. ENSURE FLEXIBILITY

Briefly, the speech of 11 January stresses the need for the development of a new regulatory framework that is flexible. Firstly, the FCC would be allowed to 'reduce' regulation for telecommunications carriers that lack market power. Secondly, a new Title VII would be added to the Communications Act, outlining a regulatory regime, in order to encourage firms to provide broadband, switched digital transmission services.

2. THE REGULATORY FRAMEWORK IN JAPAN

Japanese cable television companies do not encounter any regulatory restrictions in relation to the provision of telecommunications services. However, there is only one such company which offers this type of service: Lakecity Cabletelevision. Access to the network is however subject to the authorization of the Ministry of Post and Telecommunications (MPT).

Telecommunications operators can provide television broadcasting services, except for the main operator: NTT. In practice no operator offers these services.

NTT and other operators may provide networks for cable television.⁸

C. SOME MAJOR ISSUES AND KEY PRINCIPLES

The following issues have been identified as requiring special attention. They are key principles of the functioning of the European information market, and at the same time they may be affected by the growing convergence between telecommunications and media.

These issues are 'horizontal' in the sense that they concern the three areas highlighted in this report, i.e. technical aspects of convergence, importance of the actors, and variety of the services.

I) SAFEGUARD OF COMPETITION

It may be argued that the safeguarding of competition is not an objective as such. Indeed, it may be seen as the best method found up until now to improve quality of the services, dynamism of the markets and competitiveness of the prices. For the purposes it thus serves, safeguarding competition is obviously an essential objective.

The fact that information is by essence an intangible good does not prevent it from also being a tradeable commodity. In the same manner as one talks of an 'information society', one speaks of an 'information market'. As such, in its economic aspects, this market must be regulated by the same competition rules as other markets in the Community areas: it is a market in which economic actors will offer products and provide services, enter agreements and commercial relations. There has been little case-law so far on the application of competition rules (either EC or national) to the information market; but its growing economic importance will inevitably increase litigation and will make it necessary to define the mechanisms of application of competition law.

Convergence will render such definition all the more difficult:

- Agreements between undertakings will have to be examined in order to decide when exemptions can be granted, to e.g. promote 'technical progress',⁹ due to growing convergence, agreements could more often than before be entered into between companies originating from very different sectors, so that the impact of such

agreements on competition may be difficult to assess.

- With regard to Article 86 of the Treaty a difficulty will be to determine the relevant markets in regard to which the dominant positions must be considered, since actors of different sectors will be able to intervene on new 'transsectorial markets'. Recent case-law tends to indicate that in the information sector (be it, e.g. about TV guides or meteorological information), markets are defined narrowly (due to a low degree of substitutability), and dominant positions are easily considered as abusive within the meaning of Article 86.
- Convergence may bring about new possibilities of competition, but between actors of different strengths: telecommunication companies have greater economic power than those in the audiovisual sector. Special consideration should therefore be given to possible restructuring of existing markets, in order to avoid convergence leading to excessive one way dominance by some industries to the detriment of others. For the same reason, the possibility of applying stricter rules to some actors, or to provide 'positive discriminations' (e.g. regarding public financial aid) should be considered. The principle should be that transsectorial industries and activities should be allowed, and that legal obstacles to such converging factors should be lifted. Some rules may nevertheless have to be established, by way of exceptions, to avoid the possible negative impacts of convergence on competition.
- Convergence will give greater importance to issues of access: access to information as such (substantive contents of information), access to networks (and to technical information). In this respect, intellectual property rights, even though necessary in order to promote and reward innovation, must not be abused e.g. unduly restricting access to copyright information (such as contents of information services) or patented information (such as technical information or interfaces), or to prevent standardization and interoperability of networks.

II. SAFEGUARD OF PLURALISM

On top of safeguarding competition, it is important to ensure that pluralism is maintained. Its existence could indeed be threatened if the market structure is changed by convergence of telecommunications and media. Maintaining pluralism, as a method of ensuring the diversity of the information available to the public and thus democracy, and as reflecting cultural diversity in Europe can be viewed from an external point of view, by examining the number of channels and above all by the number of 'supervisors' of these channels, and from an internal point of view, by examining the contents of the programmes which are offered.

A preliminary observation must be made. The safeguarding of competition which will have to be ensured in the multimedia market (see above) cannot on its own guarantee that pluralism will be maintained. Indeed, some situations which are likely to occur and which could endanger pluralism cannot be resolved by applying competition rules.¹⁰ The two objectives do not necessarily coincide and achieving one does not necessarily imply the other one is achieved. Beside the high thresholds

provided for by Regulation no. 4060/89 on concentrations¹¹, the present tendency to define quite segmented markets will lead to a situation where the impact of a concentration on pluralism will become difficult to assess.

The risk is that this problem will not disappear so long as alongside services combining more than one media, there will also be single media.

Furthermore, a strict interpretation of the Regulation does not enable, in the absence of significant barriers to competition, consideration to be given to pluralism as such when assessing the concentration of the operation. However, the Regulation does enable Member States to take appropriate measures so as to ensure the plurality of media when the Commission does not initiate a procedure against a concentrated operation with a Community dimension, (provided these measures are compatible with the general principles and other provisions of Community law.)¹² Any restriction must therefore conform with the rule of the freedom to provide services embodied in article 59 of the Treaty and the free flow of television programmes which is embodied in the Directive 'Television without frontiers' and also with the limitations of these principles which are allowed pursuant to article 56 of the Treaty and article 10 of the European Convention on Human Rights.

THE EXTERNAL ASPECT OF PLURALISM: THE DIVERSITY OF CHANNELS AND THE CONTROL OF SHAREHOLDERS

It therefore clearly appears that national regulations remain necessary in order to guarantee the external aspect of pluralism regardless of whether the concentrated operations have a Community dimension. Such national regulations exist at the moment, with great differences between Member States (both in so far as the type and scope of restrictions are concerned), which limit cross-ownership between companies belonging to the press sector and the television or radio broadcasting sectors or which limit the maximum stake of one single shareholder in these companies. However, these regulations rarely take into consideration the threat to pluralism which could result from the entry on the multimedia market of new actors, such as telecommunication operators and companies belonging to the consumer electronics sector. It is therefore necessary to be cautious in order to avoid deregulation, which is desirable to ensure the development of a new multimedia market and competition within this market, destroying pluralism. To avoid such a damaging situation, deregulation must not take place by removing existing regulations on transsectorial ownership except when they contain prohibitions rather than limitations on the plurality of ownership in various medias. The latter will need to be re-thought to take into consideration the arrival of new actors in the market but not by the dismantling of obstacles to transsectorial provision of services. Obstacles to such a provision currently exist and are often one way obstacles in the sense that they only concern companies in the press sector or the television sector, which are already in a weak position compared with the other interested actors (telecommunications and computer).

Another prerequisite for maintaining external pluralism is the possibility for media companies to have sufficient advertising income to survive and remain profitable.

This income is likely to fall in future because convergence will

probably lead to the creation of increasingly specialized channels. The audience will therefore become more fragmented, and advertising (except when it concerns a product which interests a wide public) will become more and more specific and its income scattered between the numerous channels. These in turn will have to find alternative means of income and it is expected that the different medias will become 'toll' medias or that they will start adopting the 'pay-per-view' system. This will have implications for the provision of a universal service (see below). Furthermore, advertising rules will have to be re-thought. A difficulty for instance will be controlling the time devoted to advertising.¹³

THE INTERNAL ASPECT OF PLURALISM: CONTROL OVER THE CONTENTS OF THE PROGRAMMES AND SAFEGUARD OF EUROPEAN PRODUCTIONS

Different questions must be raised here. First of all, convergence between telecommunications and the media will lead to a confrontation of regulations. Regulations concerning the different medias are characterized by action over the content of what is broadcast, while this is not the current situation regarding telecommunications regulation. A new approach must therefore be adopted. Regulation over content must concern all multimedia programming, whatever the technology used, if we are to avoid counteracting the current rules on the content of television programmes. Furthermore, such a regulation must respect national cultural diversity and the principle of subsidiarity. Also the current rules on quotas, which are contained in the Directive 'Television without frontiers', will have to be put into question because it will no longer be possible to control them. Indeed, the user of new multimedia services having complete programme choice, could always bypass these rules by for instance choosing only to watch American productions.

In order to guarantee the survival of European productions, it will therefore be necessary to take positive action by granting larger aid to production. In this respect, the Treaty on European Union is a step ahead since the new article 92 of the Treaty provides in paragraph 3,d) that "aid which is destined to promote culture and the conservation of heritage when it does not alter the condition of exchange and competition in the Community in a way which would be contrary to the common interest is compatible with the common market." (our translation). Furthermore, the new Article 128 of the Treaty provides that Community action could complete the action by Member States in the area of artistic and literary creation, including the media sector.

In this context, the function of media programme public companies, as classic guarantors of local production, could be put into question. The American solution considers that the public service media should be available to all local interest groups together with aid (including training) to produce such media programmes. This, together with the obligation on the operators to broadcast such productions (must carry rule) should be examined. This is another way of ensuring both the respect for pluralism and for local production.

III. CONVERGENCE AND UNIVERSAL SERVICE

The universal service concept, which recently appeared in Europe, is already a major goal in Community-wide telecom-

munications policy. The aim is to achieve this goal in a competitive environment. As such, universal service refers to a "defined minimum service of specified quality", made available "to all users at an affordable price".¹⁴ Of utmost importance is the definition of the 'basic service package' for universal service purposes: what, indeed, is included in this package? What service elements make up a Community-wide public service policy? The answers to these questions are all the more important in the context of convergence between telecommunications and media industries. Since the capacities offered will be ever greater, how are we to adapt the universal service concept to future evolution? Should we specify its contents (with the risk of seeing them fast become obsolete?) or should we simply lay out guidelines? The determination of what makes up the basic service package will not only depend on capacity offered by the future 'super-highway', but also on economic needs. In any event, it is accepted by everyone today that voice transmission ('Plain Old Telephone Service' or 'POTS') is a universal service goal. In the context of convergence, certain 'advanced' features will have to be included in this 'basic service package'.

Thus, 'information' could become part of this concept of universal service because of what is considered 'essential' or 'vital'. This would serve to limit the dichotomy between the 'information haves and have nots'. Many examples are possible: assistance in order to fill-in administrative documents, access to administrative departments, encyclopaedic consultations, public health information, etc. D'un 'service de téléphonie universel' découlerait un 'service universel de télécommunications'.

On top of the wish to avoid living in a society operating on different levels, the universal service 'with a content' (as service 'with an informative' or 'functional' content in contrast with a mere 'technical' content) would be justified by social gains which could stem therefrom: "par exemple, nous dépensons actuellement 670 milliards de dollars en soins de santé. Si l'information préventive et la possibilité de communiquer aisément avec le prestataire de soins de santé serait à même d'épargner aussi peu qu'un pourcent de ce chiffre, ce montant sera en bonne voie de financement de cette information."¹⁵ Since 1989, a Universal Service Fund (USF) exists in the US which aims at maintaining affordable telephone tariffs. To achieve this, the USF assists high cost local exchange carriers (LECs). At present, this fund operates by using 'access charges' which are paid for by interexchange carriers (IXCs) to the LECs.¹⁶ A similar initiative could be envisaged in Europe in the more general context of convergence.

IV. PRINCIPLES FOR A NEW LEGAL FRAMEWORK

The European legal framework appears in many ways to be the major obstacle to convergence between technologies on the one hand and the actors on the other.

The reason is essentially because of the sketchy quasi dichotomic approach of the actors and technologies. This approach is based on the traditional consequences which come from the fundamental disassociation between public and private communications which is inherited from the past.

The digitalization of data (written, voice, or relating to pictures) and their compression radically transforms the foundations of the regulatory approach described.

This mutation is analysed from various points of view.

CONCERNING THE TRANSPORT CARRIERS

The evolution of the use of communication technologies does not appear to lead to a single universal network carrying an entire network message. On the contrary it has led to the existence of so called 'hybrid' networks which benefit from the use of different transport carriers, whichever is the most efficient according to the situation. Studies carried out by the OECD¹⁷ have shown that 'hertzian' transmission technologies could, in the local loop, be more efficient and much cheaper than cable or fibre technology.

Regulation can therefore no longer follow the technology criteria (see our remarks above) but on the contrary it must favour the user's choice of one or more transport carriers. This implies that emphasis must be put on the rules concerning network access and interconnection whatever these are. The rules on Open Network Provision (ONP) must be broadened in this direction. Any regulatory distinction between broadcasting and communication technologies must be swept aside, in particular, the standardization authorities must be common and their action must be coordinated on the European level following the ETSI model. The development of a plurality of transport carriers which can offer competing or complementary service implies that a plurality of companies is maintained that manage the various infrastructures which will grow in competition. This does not prohibit one operator from seeking to master various carriers but it must be seen that his position does not become dominant on the market.

In any event, the concept of 'public communications' or media must be redefined. It can no longer be defined in relation to a carrier (paper or television); it will have to be defined in relation to the aim of the message which will be either directed towards an open or closed group of users. The remarks which have already been made concerning videotext or audiotext illustrate the need to redefine a global status for the 'press' which would be founded on a few principles: independence of journalists, identification and liability of the editor, and the right to reply.

The Commission should seek to create 'Press' working groups bringing together all the actors of this sector thereby sweeping aside the present regulatory splits.

CONCERNING THE OFFER OF SERVICES

According to the Warburg report, the emergence of the so called multimedia market will profit the software industry i.e. film, video games, database producers etc., which will want to benefit from the new qualities and capacities of the infrastructure by offering their services to the home etc.

This is the reason why the telecommunications operators and software industries have a mutual desire to multiply strategic alliances and takeovers.¹⁸ At present, there are no specific rules prohibiting such operations.

For this industry, the crucial legal question concerns intellectual property which ensures the profitability of the investment. The work, which is put on the multimedia market, can be reproduced, modified, mixed, without any control over the use. The intellectual property issues which the development of multimedia raise are numerous. Here are some of these issues:

- The ownership of rights: next to the question of determining who owns the rights when the work derives from a multitude of original works, a further question is to

identify automatically (or at least easily) the owner of each work.

- The exercise of rights: technology enables the automatic exercise of the rights to use and reproduce. This automatic exercise which is implemented as soon as the work is put on to the electronic market must be standardized and requires a common definition at the European level of each of the intellectual property rights as well as the control of the owner over the exercise of these rights. Recent developments tend more and more to enable, through intellectual property rights, the control of the use of the products (for software), or control over the access to information (for databases). The legal monopoly of the holder of the rights is therefore reinforced by a *de facto* monopoly. The question of 'compulsory licences' must therefore be looked at in depth.
- Distinctions founded on the carriers concerning the applicable regulations must be abandoned: when a paper database is scanned, it must not be protected in another way just because it has changed carriers.

The traditional forms of media are also concerned with the development of new media. First, it is clear (see above) that the concentration cannot be prohibited as such because it cannot adapt its production and broadcasting to new technologies. Second, it is certain that any regulation by quotas or restriction of access will rapidly prove to be inefficient. What could be the significance of such regulations when the advance of technology enables at all times infinite choices through different transmission channels and without any control possible (public communications becoming confused with private communications in the transport of digitized information)? If promotion and defence of local cultures are considered important, it appears that the only approach possible is to subsidise production, creation and broadcasting. There is also the problem of advertising income. Traditionally, a large percentage of the advertising income went to the traditional forms of media in order to touch a wide audience. A precise location of the users of the services which are offered according to the transport carriers will enable the advertisers to better target their advertisements and to divert the advertising income from traditional media towards other service providers. The regulations on the offer of advertising are decisive in order to ensure the survival of the traditional media.

Advertising is of course essential in order to ensure the financing of certain services. Its definition through new media therefore raises the following questions:

- distinction between advertising and information;
- identification of advertising slogans;
- user's right not to 'suffer' the advertisement;
- prohibition of advertising within certain services in order to guarantee the existence of certain services which are incapable of surviving without advertising (e.g. the press) or the creation of a fund sharing advertising income.

CONCERNING THE USER OF SERVICES

The multimedia market is, first of all, a wide public market. The reduction of the installation costs of the transport carriers and the quality of the services which are likely to be offered to the

public at home justify this assertion.

In this context, reflections on the regulatory position raise the following three points:

- The question which has already been identified concerning the universal service defined no longer simply in terms of access to a technical service (voice transmission) but as a right of access to certain information contents (the right of access to certain programmes, certain databases, etc.). Indeed, technology enables one to go from a public communication logic to a subscription and password logic.
- The question of privacy: this arises differently in a context where national frontiers no longer exist, where information comes from the actual use of the service and where the places for storing data which are thereby created are numerous and not obvious to the data subject.
- In addition, the development of databases (with pictures) raises the question of the adaptation of our legislation which was based on written databases.

Then there is the method of regulating the form of intervention adopted. Would it not be better to adopt the more flexible method of codes of conduct to which servers wishing to have access to a network would adhere to? The same idea can be expressed in so far as the questions of lawfulness and morality of these messages are concerned.

- The last question concerns consumer protection: this requires a reflection as to the ability of the individuals who offer services by electronic means to use technical systems enabling the consumer to identify them, to authenticate the data, the transaction, the reliability of their preservation, etc.

FOOTNOTES

¹Telecommunications Policy, June 1991, pp. 182-194, p.183

²See Vice-President Gore's speech of 11 January 1994, p. 9.

³National Telecommunications and Information Agency (NTIA), report on *Telecommunications in the Age of Information*, NTIA Special Publications, 91-26, US Department of Commerce, October 1991.

⁴See Information Services Ruling, *United States v Western Electric Co Inc.*, Civ Action, No. 82-01092, D.D.C., 25 July 1991.

⁵For further information on this topic, see NTIA report, aforementioned, p. 243; note 884.

⁶Pool, cited in Gershon, p. 118.

⁷NTIA report, p. 242.

⁸For more details, see Virat Patel, in *Telecommunications Policy*, March 1992, pp.98-194.

⁹Article 85.2 of the Treaty.

¹⁰On this point, see the analysis carried out by the Commission in the Green Book on pluralism and media concentration in the internal market, the limits of the coincidence of interest between the safeguard of competition and pluralism, COM (92) 480 final, p. 86 and following.

¹¹O.J. No. L 395/1 of 30.12.1989.

¹²Article 2163 of Regulation No. 4064/89.

¹³See articles 18 and 19 of the Directive 'Television without frontiers'.

¹⁴Commission Communications of 28 April 1993, COM(93)159.

¹⁵Hadden, p.82.

¹⁶For plus d'information, voir la rapport précité NTIA, p.310-311.

¹⁷Computer services, computerized information services and value added network services', reply to the OCDE questionnaire (joint working group CMI/PIIC), September 1989, 62 pages.

¹⁸E.g. the takeover of Paramount by TCI and decisions announced by Microsoft.

RECOMMENDATIONS

1. The Commission should envisage the creation of an 'information market' watchdog gathering technicians, economists and lawyers and having an advisory capacity on the future measures to be taken in order to promote the development of the information market, including the maximal use of the different infrastructures.

This organization should:

- discuss the impact of organization technological development on new services
 - analyse the strategies of the different actors
 - examine the present legal barriers for this development and promote a new legal framework taking into account the legitimate interests of the different actors and users in a democratic and pluralistic society
2. In the context of the work done by this Commission, the following measures should be examined more specifically:
- the impact of certain regulations (mostly in the UK and the Netherlands) allowing the transsectorial ownership and the transsectorial provision of services;
 - the development of the US policy concerning the relation of NII.

3. Following its new competence regarding the cultural activities, the Commission has to organize a better convergence of the national and regional policies concerning the audiovisual and press sectors (including regulations on 'publicity').

4. Certain large public multimedia services have to be supported

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